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No. 84-101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRONTEL, LTD, et al.,

Petitioners.

vs.

THE CITY OF NEW YORK, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD AYRES GIVENS
BOTEIN HAYS & SKLAR
200 Park Avenue
New York, New York 10166
(212) 867-5500

Counsel of Record for Petitioners

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Summary

Corporation Counsel seeks to sidestep the issues raised by the Petition in two principal ways:

1. Most amazingly, Corporation Counsel seems to deny (CC 21; CC i)[1] the existence of the signed written settlement executed on Corporation Counsel's own stationery by an Assistant Corporation Counsel, made part of the record below (JA 167-168), and announced in open Court by Corporation Counsel itself (JA 219) as set forth in the Petition at 33 and never denied by Corporation Counsel.

The signed settlement, set forth in the supplemental appendix to this reply brief (1 ra), deals directly with the resolution of the federal claims raised by the complaint below, by calling for

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[1] References to Corporation Counsel's brief in opposition to the Petition are in the form "CC--," to the Joint Appendix below in the form "JA--," to the supplemental appendix to this reply in the form "--ra," and to the appendix to the original Petition in the form "--a." For statement as to parties under Rule 28.1 of the Rules of this Court, see Petition at III-IV.

dismissal of the case in exchange for procedures for redemption of the real estate taken from its owners by the City's illegal conduct.

2. Corporation Counsel erroneously treats the question raised in the Petition concerning the propriety of finding absolute antitrust immunity prior to trial for alleged anticompetitive abuse of the Defendants' combined regulatory and proprietary functions as an attack on the facial validity of rent control. Thus in its statement of the questions presented (CC i) Corporation Counsel says that the first issue involves whether "New York City's Rent Control Laws violate the Sherman Antitrust Act..."

By stark contrast, the Petition seeks to question the permissibility under federal law of the way the Defendants

used the totality of their powers and proprietary activities to enhance their market position by first destroying the economic viability of -- and then taking, the real estate involved in the Petition.

The complaint below alleged that the totality of these Defendants' actions made it impossible to pay the City's own taxes (44a-57a), a circumstance now relied on by the Corporation Counsel to foreclose review of that very conduct (CC 2). Rent control as such is not challenged or in issue here.

Contrary to Corporation Counsel's assumption (CC 18), subsequent State takeover of City rent controls does not legitimize prior abuses. Indeed, it more likely indicates State dissatisfaction with those abuses. Contrary to Corporation Counsel's implication, subsequent state takeover should hardly

insulate the City from appropriate equitable relief such as divestiture of the properties involved here if a violation were found after trial.

POINT I

Contrary to Corporation Counsel's Claim, A Written Settlement Agreement Relating to Petitioners' Federal Claims Was Executed, and Repudiated by the City.

Corporation Counsel's brief states that:

"Petitioners...do not even refer to a signed settlement agreement..." (CC 21).

In fact, the Petition set forth in its Appendix at 74a that the settlement described in the text of the Petition at

14 was in the form of two letter agreements attached to the complaint below as Exhibits B and C (JA 167-168).

Exhibit C to the complaint is a letter signed by Judah Dick, Assistant Corporation Counsel on Corporation Counsel stationary dated September 21, 1982, and reproduced in the supplemental appendix to this reply at page 1 ra. It begins with the following words:

"This will confirm our understanding relative to the above-captioned actions."

Corporation Counsel also does not deny that, as set forth in the Petition at 33, Corporation Counsel announced settlement of the case in open federal Court on October 19, 1982 (JA 219).

Based on this announcement, "the attorneys for all parties having appeared and advised the Court that all claims asserted herein have been settled," the

District Court that day ordered the action discontinued (JA 47, 3 ra). Corporation Counsel's suggestion (CC 3) that some further acceptance was required is thus without the slightest basis.[2]

This signed, written settlement announced to the District Court (1 ra) deals directly with the issues raised in the Fourteenth Amendment and Sherman Act claims of the complaint below, by permitting petitioners to redeem the properties alleged to have been lost as a result of the City's illegal conduct. Divestiture is, of course, a common antitrust remedy. United States v. E.I. duPont de Nemours & Co., 366 U.S. 316 (1961); Schine Chain Theatres v. United States, 334 U.S. 110 (1948). Indeed, an antitrust court has discretion to fashion

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[2]Defendants have accepted and retained substantial payments in consideration of these agreements (79a).

any remedy reasonably related to the alleged violation. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

Corporation Counsel's reliance on Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299 (4th Cir), cert. denied 439 U.S. 1047 (1978) as supporting lack of original District Court jurisdiction to enforce a settlement of a federal case by means unrelated to the federal claims (CC 22) is thus factually as well as legally misplaced. Indeed, the Fairfax Court stated that when, as here, "the settlement agreement resolved the dispute giving rise to the original litigation over which the district court had jurisdiction, any dispute involving the agreement itself was likewise properly before the court." 571 F.2d at 1304.

Moreover a subsequent Fourth Circuit decision cited in the Petition at 34 but not discussed by Corporation Counsel emphatically asserts jurisdiction to enforce settlements of federal litigation generally. Gamewell Mfg. v. HVAC Supply, 715 F.2d 112, 115 (4th Cir. 1983).

Corporation Counsel does not question that courts in other Circuits have repeatedly held that the district courts have jurisdiction under 28 U.S.C. § 1331 to enforce settlements arrived at to deal with federal claims, even where the settlement goes beyond what may be required to remedy the alleged federal violation. This holding was repeated most recently in Sansom Committee by Cook v. Lynn, 735 F.2d 1535, 1539 (3d Cir. 1984, rehearing denied 7/6/84), published after the filing of the Petition.

The rulings of courts below thus conflict directly with decisions in other Circuits.

POINT II

Corporation Counsel Erroneously Treats the Petition as Raising the Question of the Facial Validity of City Rent Controls.

Corporation Counsel relies on Benson v. Beame, 50 N.Y.2d 994 (1980), appeal denied 449 U.S. 1119 (1981) and state statutes generally authorizing City rent controls to assert the validity of the City's rent controls (CC 13-19). None of this is responsive to the issues raised by the Petition, which nowhere suggests in any way that City rent controls were illegal as such. Corporation Counsel's argument thus amounts to asserting that

all uses or abuses of the Defendants' powers are conclusively immune per se no matter how applied.

POINT III

The City's Monopolistic Conduct Alleged in the Complaint Dismissed Below Was Neither Approved by the State Nor Rendered Irrelevant by Subsequent State Takeover of Rent Controls, and Caused Petitioners' Nonpayment of City Assessments.

Corporation Counsel has cited no authority whatever remotely suggesting that New York State authorized the City to exercise its regulatory and proprietary powers in such a manner as to amass a dominant position in low and middle income housing by making competing private housing uneconomical and then confiscating it as alleged in the

complaint below (44a-73a) - which must, of course, be taken as true for purposes of testing its dismissal. Compare "...New York City's Biggest Landlord is Now New York City," N.Y. Times 11/27/83, p. 58.

On the contrary, State policy was specifically to foster "the transition to a normal market of free bargaining" (N.Y. Unsolidated Laws § 8602, L. 1962, ch. 21, § 1(2), Petition at 16) and not to permit controls to become more onerous (Urstadt Act, N.Y. Unconsolidated Laws § 8605, L. 1971, ch. 1012, § 1, Petition at 17).

In this context, the conflict between the decision below and those in Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) and Corey v. Look, 641 F.2d 32 (1st Cir. 1981) is glaring. The First and Ninth Circuits refused to infer state authorization for anticompetitive use of municipal regulatory power to hurt

competitors of proprietary activities of the municipality from generally worded state enabling provisions.

Corporation Counsel seeks to avoid the importance of these holdings by stressing that the ultimate conclusion in Parks and Corey was absence of state authorization for the challenged anticompetitive behavior (CC 19-20 & 20 n). What Corporation Counsel does not stress is that the key question was not the presence of overall authority in an area of activity -- but rather the presence or absence of state authorization for the anticompetitive use to which the municipality was alleged to have put its conceded generalized authority. Parks and Corey are inconsistent with finding such

authorization from the mere grant of generalized authority such as that in the present case.

Similarly without support is Corporation Counsel's suggestion that the subsequent 1983 State takeover of rent controls supports dismissal of the complaint (CC 18). The complaint, filed in 1982 before the 1983 takeover, alleged illegal acts before that takeover. The District Court clearly has discretion to fashion appropriate equitable remedies for past violations, such as the return of the properties involved, contemplated by the signed settlement (1 ra) announced by the City in open Court (JA 219) but repudiated and disregarded by the City. See United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316 (1961).

Moreover, the State takeover is doubtless more consistent with concern for the massive destruction of the City's housing stock as described in the complaint than with any retroactive approval of the kinds of conduct alleged below. Compare Severo, "15,000 Seek 208 Brooklyn Apartments," N.Y. Times 8/2/84, p. B3.

The complaint alleged that a multidimensional squeeze imposed on Petitioners by illegal City conduct brought about large and increasing operating losses before any debt service (50a-51a), leading to inability of the properties to pay City taxes which were based on assessed valuations at high multiples of fair market values based on arms' length sales (47a, 55-56a). Yet Corporation Counsel now seeks to rely on

the inability to pay these predatory taxes as a basis for avoiding review of the City's conduct (CC 2).[3]

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[3] As opposed to rents fixed as low as $30.10 per month (56a), the City's monthly rent allowance for a single person is $193. City of New York, Guide to New Public Assistance Rents and Shelter Allowance Procedures 3 (April 1984). Meanwhile, Corporation Counsel has successfully barred all tax certiorari trials involving inequality since 1975 and continues to do so (JA 177-178) despite representations to state and federal courts that this would no longer continue, most recently in Friarton Estates Corp. v. City of New York, 681 F.2d 150, 160 (2d Cir. 1982) where the Court accepted the City's representation that it had "moved to schedule trials with reasonable speed"; see also In Rem Foreclosure, Index No. 46001/77 (Evans, J. 5/15/80), aff'd 79 AD2d 899 (1st Dept. 1980, appeal dismissed, 53 N.Y.2d 195 (1981), cert. denied sub nom. Friarton Estates Corp. v. City of New York, 454 U.S. 837 (1981): "It would, of course, be inequitable to allow in rem foreclosure...if in fact the taxes were improperly overassessed and if [the owners] did not have a reasonable opportunity to obtain a proper assessment. Such a transfer of title would be an unconstitutional taking of property without compensation." JA 178.

Corporation Counsel nowhere questions the catastrophic effects of the conduct alleged in the complaint on the petitioners, on the general public, and on commerce, nor disputes the underlying facts constituting the alleged federal violations.

CONCLUSION

The complaint below alleged massive anticompetitive abuses of municipal power contrary to State law and disregard of a signed written settlement of a federal case solemnly announced to a federal Court. Important questions of federal law involving weighty public as well as private interests are raised by the Petition, justifying review by this Court.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

RICHARD AYRES GIVENS
BOTEIN HAYS & SKLAR
200 Park Avenue
New York, New York 10166
(212) 867-5500

Counsel of Record for Petitioners

APPENDIX

[JA-168]

The City of New York
Law Department
100 Church Street
New York, NY 10007
Rm. No. 6D7
(212) 566-4159

FREDERICK A. O. SCHWARZ, JR.

Corrected Letter
September 21, 1982

Richard H. Maidman, Esq.
485 Madison Avenue
New York, N.Y. 10017

Re: (1) Rent Control Memorial Corp. v. City of New York

(2) Brontel Ltd. v. City of New York

Dear Mr. Maidman:

This will confirm our understanding relative to the above-captioned actions. Both actions will be discontinued with predujice. As to Block 1599, Lot and Block 1621, Lot 65, this office will recommend to the Comptroller (as part of the Friarton/Sonia package) to reduce the

assessment for all unsettled years for which a tax review petition is pending at 50% of the assessment, provided that there have been no settlements made by the Tax Commission. In the event there have been such settlements, the numbers will have to be examined to yield a fair result. Prior to August 10, 1983, and preferably much sooner, Bronel and Rent Control should apply to the Board of Estimtae for a discretionary release of the City's interest. If they thereafter deposit certified checks for the reduced taxes, etc. in sums sufficient to redeem the property, this office will recommend approval of the applications for redemption to the Department of General Services and the Board of Estimate.

Yours truly,

/s/
JUDAH DICK
Assistant Corporation Counsel

EXHIBIT "C"

[JA 47]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RENT CONTROL MEMORIAL CORP.
and BRONTEL, LTD.,
-v-
THE CITY OF NEW YORK, PHILIP R.
MICHAEL as COMMISSIONER OF
FINANCE OF THE CITY OF NEW YORK
AND TAX COMMISSION OF THE CITY
OF NEW YORK,

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82 Civ 2664 (EW)
ORDER OF DISCONTINUANCE

This cause having come on to be heard before me and the attorneys for all parties having appeared and advised the Court that all claims asserted herein have been settled, it is

ORDERED that the above entitled action be and hereby is discountinued without costs to either party and without prejudice to the right, upon application made within sixty (60) days of the date of this Order, to re-open the action if the settlement is not fully consummated.

Dated: New York, N.Y.
October 19, 1982

/s/ EDWARD WEINFELD
UNITED STATES DISTRICT JUDGE